

The Public Trust in Tidal Areas: A Sometime Submerged Traditional Doctrine

Demands upon tidal areas¹ (for navigation, fishing, raw materials, recreation, aesthetics) vary directly with increases in population, commerce, and navigation. As with any other inherently limited resource, when demands increase, it becomes more important to insure both its widest possible and most efficient utilization.²

When demand is low, as for example in a thinly populated region with little commerce, private ownership provides an adequate method of regulation at the lowest possible cost. On the other hand, when conditions become more crowded and competitive, organization by private property, with its right to exclusive use, is likely to conflict with the goal of ensuring the resource's widest possible use. Moreover, to the extent that the right to use tideland resources is allocated purely by the "invisible hand" of the market, unfair and inefficient resource allocation will result from insufficient consideration of externalities and interests not measured by the market's exclusively economic criteria.³

Given the number and importance of the conflicting interests in tidal areas, and given the imperfections of the private market and earlier regulatory systems, it is hardly surprising that a law of the foreshore proved necessary, or that this law is ancient and complex. The law has had to hold the balance between the many combinations of conflicting interests, especially when interests that would not otherwise be adequately recognized or protected have been involved.⁴

1. Although not always used with the same meaning in the case literature, the "shore" is usually and hereinafter defined as "that ground that is between the ordinary high water and low water mark." LORD HALE, *DE JURE MARIS* (1786) [hereinafter cited as HALE, D.J.M.J., republished in S. MOORE, *A HISTORY OF THE FORESHORE* 378 (1888) [hereinafter cited as MOORE, *FORESHORE*]. The "foreshore," also used loosely, is often treated synonymously with "shore." *E.g.*, *Scrutton v. Brown*, 4 B & C 485 (1825). The main definitional confusion is caused by rivers and estuaries that rise and fall somewhat, but not completely, with the tides and which are treated in legal theory in much the same way as the ocean front shore. "The word 'foreshore,' used in the later English decisions, appears . . . to denote the shore and bed of the sea, and of every channel, creek, bay, estuary, and of every navigable river of the United Kingdom, as far up the same as the tide flows . . ." J. GOULD, *A TREATISE ON THE LAW OF WATERS* § 27, at 61 n.1 (1900). We will use "foreshore" in this second broader sense.

2. Maximum benefits are not obtained from a resource unless (1) conflicting claims are given priorities that accurately reflect their relative importance and (2) provision is made for multiple use to the extent that less pressing claims can be allowed without seriously damaging higher priority uses.

3. If the private market system is imperfect, the earlier system of feudal tenures reflected even fewer interests—presumably one of the reasons for the early modern shift to *laissez-faire*.

4. For example, the interest of navigators in any one portion of the foreshore is almost

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The courts have been and are faced with what is essentially a problem in cost-benefit analysis,⁵ but they have felt themselves unable to make their decisions on overtly normative and economic grounds. Charged with the duty of resolving disputes regarding the use of tidal areas in a "principled" manner, the courts have had to articulate rules to balance and order the conflicting interests. This task has not been easy since the most reasonable and beneficial ordering of interests differs from case to case and from period to period.

Over the centuries, courts have repeatedly tried to redefine supposedly "immutable" rules to fit the most common contemporary conditions. As we shall see below, the law has reversed direction several times and has eddied back and forth a great deal. Nonetheless a relatively clear, because relatively constant, core of rights exists alongside the many doctrinal confusions and inconsistencies. To understand the inherited doctrines and to foresee the logic of their future development, we must first try to give them their proper historical perspective.

I. Historical Survey

A. Roman Law

Roman jurisprudence, developed in a society with heavy commerce, with important urban concentrations, and with a legal heritage from the sea-dependent Greeks,⁶ held that by the most basic "natural law" the "air, running water, the sea, and consequently the seashore" were "common to all."⁷

No one therefore is forbidden access to the seashore, provided he abstains from injury to [improvements]. . . . [A]ll rivers and harbours are public, so that all persons have a right to fish therein . . . everyone is entitled to bring his vessel to the bank [of a river],

always too fleeting to allow them to protect their vital interests through direct control (e.g., ownership). Similarly, citizen interests in aesthetics or bathing, while significant in the aggregate, are generally too indirect and atomized to be easily recognized by the economic measures of the market.

5. Joseph Sax, in his just published article concerning judicial intervention in the public trust area, suggests that the courts' role is to ensure full cost-benefit analysis in the resource-use decision process. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 488, 564 (1970).

6. JUSTINIAN, INSTITUTES 1, 2.2, 2.3, 2.10 (4th ed. J.B. Moyle transl. 1889).

7. *Id.*, 2.1.1. Schultes expands on this point:

By the Roman law, the sovereignty of government extended over the sea, but the occupation of it belonged to all the subjects of the empire universally, for the unlimited exercise of fishing, navigating, and taking water; and as this privilege was illimitable and unrestrainable, so, therefore, it was incapable of individual exclusive appropriation

H. SCHULTES, AQUATIC RIGHTS 2 (1839), citing Herodian Lib. 2, cap. 15.

and fasten cables to the trees growing there and use it as a resting place for the cargo, as freely as he may navigate the river itself. But the ownership of the bank is in the owner of the adjoining land, and consequently so too is the ownership of the trees which grow upon it. Again, the public use of the seashore, as of the sea itself, is part of the law of nations; consequently everyone is free to build a cottage upon it for purposes of retreat, as well as to dry his nets and haul them up from the sea. But they cannot be said to belong to anyone as private property, but rather are subject to the same law as the sea itself, with the soil or sand which lies beneath it.⁸

This imperial law is the original foundation from which the common law developed;⁹ Bracton and Fleta copied it extensively, especially in this area.¹⁰ It has been used in modern cases in which the court has sought to whittle down private claims perceived to be contrary to the public interest.¹¹ Where subsequent law is found to differ, proponents of the public trust can hold the original Roman law up as a useful model of doctrinal purity to which we should return.

B. *The Dark Ages*

As is well known, with the decline of the Roman Empire, Europe retrogressed in terms of commerce, navigation, and effective governmental administration. Public ownership of waterways and tidal areas frequently gave way to ownership by local powers and feudatories. Many continental princes, for example, came to claim that the right to fish was their personal property and required that all their fishermen be licensed for a fee.¹² In the British Isles, then a thinly populated frontier, this process of decentralizing control was far advanced by the time of the Domesday Book.¹³ The English King's jurisdictional and

8. JUSTINIAN, *INSTITUTES*, 2.1.1-2.1.6. See also CELSUS D. 43, 8, 3; 2 C. SHERMAN, *ROMAN LAW IN THE MODERN WORLD* 140 *et seq.* (1917); N. KARADGE-ISKROW, *LES CHOSES PUBLIQUES EN DROIT ROMAIN* 66 *et seq.*, 90 *et seq.* (1928); W. HUNTER, *ROMAN LAW* 164 *et seq.* (1876); J. ORTOLAN, *THE HISTORY OF ROMAN LAW* 620 *et seq.* (1870 ed., I. Prichard and D. Nasmith transl. 1871); R. MELVILLE, *ROMAN LAW* 218 *et seq.* (3d ed. 1921); 2 R. POUND, *READINGS IN ROMAN LAW AND THE CIVIL LAW AND MODERN CODES AS DEVELOPMENTS THEREOF* 47-63 (issued privately at Harvard 1916).

9. "And even our own early law writers did not hesitate to hold nearly the same doctrine as part of our own law." R. HALL, *ESSAY ON THE RIGHTS OF THE CROWN AND THE PRIVILEGES OF THE SUBJECT IN THE SEASHORE OF THE REALM* 105 (2d ed. 1875).

10. SCHULTES, *supra* note 7, at 125. See also K. GUTERBOCK, *BRACTON AND HIS RELATION TO THE ROMAN LAW* *passim* (B. Coxie transl. 1866).

11. See, e.g., *Scott v. Wilson*, 3 N.H. 321, 324 (1825); Franklin, *Concerning the Influence of Roman Law on the Formulation of the Constitution*, 38 *TULANE L. REV.* 621 (1964); Stein, *The Attraction of the Civil Law in Post-Revolutionary America*, 52 *VA. L. REV.* 402 (1966).

12. SCHULTES, *supra* note 7, at 6 *et seq.* The Norman conquerors may well have brought that idea from the continent.

13. "Numerous several private, exclusive fisheries in tidal waters were in existence before the date of Domesday, and in non-tidal waters the fisheries appear to have been

sovereign claims to tidal areas became confused with a personal private property claim, a confusion handily furthered to this day by successors in interest to the King, notably the American states.¹⁴ The King claimed a private interest in tidal and riverbed soil, and consequently the private right to whatever could be found on or under the soil—be it sand, stones, minerals, seaweed and shells (for fertilizer), or deserted wrecks or flotsam that washed up onto the shore. He also claimed the right to “several fishery” (an exclusive private right to fish) in these areas. Since private ownership always entails the right to alienate, and since the King could not easily enjoy these interests everywhere directly, Saxon grants, confirmed and extended by the Norman kings, vested the largest portion of the English foreshore in particular subjects.¹⁵ Several especially anomalous aspects of this royal grab for property survived well into the modern age. In theory, the Crown had the exclusive right to certain types of fish,¹⁶ and it retained the right to take a net down many of the kingdom’s rivers several times a year through all private fisheries.¹⁷ Between what the King claimed for himself and what the lords received by grant or took by prescription, the old common ownership in the public provided for in Roman law was seriously if unevenly eroded.

C. *Magna Charta*

This process of proliferating private ownership and control of tidal areas led to increasing public inconvenience. The Magna Charta, in part a reaction to these inconveniences, can be seen as a salient point at which the doctrinal trend began to shift back in the direction of protecting the public’s interest, especially in the areas of navigation and fishery rights. The steps taken in this period, however, were insignificant when compared with those which have since been attributed

all appropriated to the lords of the manors.” S. MOORE & H. MOORE, *THE HISTORY AND LAW OF FISHERIES* xliii (1903). [Hereinafter cited as MOORE & MOORE, *FISHERIES*.] “[Such fisheries] existed in almost every piece of tidal water round the coasts which was naturally available for the profitable exercise of an exclusive fishery.” *Id.*, xlii-xliii. But see the less well documented assertions of HALL, *supra* note 9, at 47.

14. In the words of a California legislative committee: “[T]he territorial water became embedded in history and law as a tangible asset to be enumerated in every king’s list of riches.” REPORT OF THE STATE INTERIM COMMITTEE ON TIDELANDS, SENATE OF THE STATE OF CALIFORNIA 21 (1953).

15. MOORE, *FORESHORE* 639. This conclusion is contrary to that of Hall. While recognizing that it is more difficult to prove a negative, and also that Moore favors *laissez-faire* private ownership while Hall is a partisan of the public trust theory, Moore’s more recent and much better documented study is more persuasive.

16. MOORE AND MOORE, *FISHERIES* 191. These royal fish were whales, sturgeon, and porpoises.

17. *Id.* at 81.

to it. Every grain of public interest protection to be found in the Magna Charta was subsequently seized upon and developed to illogical and unhistorical lengths by a legal system struggling to adapt the law of the foreshore to new and more demanding economic and political conditions. In the process of developing ("interpreting") the terms of the contract made at Runnymede, the courts, while never abandoning the original Roman conception of a general common ownership in all the people, began to speak in terms of particular guaranteed rights. The resulting doctrinal ambiguity continues to this day, although the emphasis on particular public rights or easements has become dominant. By considering both what the Magna Charta actually provided and what has since been claimed for it, we can get a pretty clear idea of how far, and in what direction, the common law has moved over the centuries.

At the time of Magna Charta, river navigation was threatened by the large number of weirs (permanent fishing structures fixed to the bottom) and other such devices—so much so that Chapter 33¹⁸ specifically prohibits them: "All kydells [weirs] for the future shall be removed altogether from Thames and Medway, and throughout all England, *except upon the seashore*." [Emphasis added.]¹⁹

The common law developed this simple provision a very great distance as it sought to broaden the public's interest. Although the provision in all versions of the Charter prohibits weirs only, and then only in inland waters, the presumed general intent to insure unobstructed passage for navigation has been seized upon as a basis for repeated assertions that the super-sanction of Magna Charta prohibited *all* obstructions.²⁰

The exception made in the last four words of Chapter 33, "except upon the seashore" (*nisi per costeram maris*), seems to render this part of the Charter almost useless to those championing the public interest in tidal areas. If anything, it is harmful in that it has been interpreted by Lord Hale to imply that the seabed below the low water mark (where most weirs were located) might be alienable to private property

18. Chapter 23 of the revised "Great Charter" of 1225. The last four words excepting the seashore were added by Henry III in the revised version.

19. This provision of the Charter is still on the English statute books. J. HOLT, *MAGNA CARTA* 1 (1965). "It grew from the privilege the City of London had won in its charters of 1196 and 1199 to destroy all such nuisances affecting access to and from its port." *Id.* at 49.

20. The constantly cited seven-line report of *Rex v. Clark*, 12 Mod. 615 (1701) (concerning locks not weirs) is typical: "And per Holt, Chief Justice, to hinder the course of a navigable river is against Magna Charta, c. 23," See also J. ANGELL, *A TREATISE ON THE LAW OF WATERCOURSES* 194 (1840). [Hereinafter cited as *ANGELL, WATERCOURSES*.]

holders.²¹ This chapter is the basis on which Magna Charta has been cited, with some considerable exaggeration, as grounds for a public easement in freely navigable waterways, but it cannot be stretched to cover what it specifically excepts.

This chapter of Magna Charta has also been interpreted to bar several fisheries by extrapolation from its banning one of their most effective tools. However, the protection of navigation provides a more convincing and complete rationale. Weirs are a much more likely impediment to navigation in rivers than in the sea. Moreover, it seems unlikely that the king would have allowed fishing monopolies in the sea and not in inland waters, where a larger proportion of the potential fishing areas were claimed by the riparian owners.²²

The only other portion of Magna Charta faintly related to the public interest in waters or tidal areas is Chapter 47: "All forests that have been made such in our time shall forthwith be disafforested; and a similar course shall be followed with regard to river-banks that have been placed '*in defense*' by us in our time." [Emphasis added.]²³ Although there is no specific exception of tidal areas here, there is also no mention of them.

Once again, however, the common law has expanded the Magna Charta almost unrecognizably over the years.²⁴ Moore and Moore argue persuasively that there is no historical basis for associating Chapter 47 with fisheries—that ancient records referring to rivers "in defense" never refer to fishery, but instead are concerned with the repair of banks and bridges to accommodate the royal interest in falconry.²⁵ However,

21. HALE, D.J.M., *supra* note 1, at 389.

22. W. McKECHNIE, *MAGNA CARTA*, 344 (2d. ed. 1914).

23. Chapter 16 of the "Great Charter" of 1225.

24. Blackstone contributed heavily to this process:

A *free fishery*, or exclusive right of fishing in a public river [*i.e.*, with no grant of the soil], is also a royal franchise [*i.e.*, a royal prerogative (a right or interest held by the Crown for its own benefit and not as a matter of public trust) delegated to a subject] . . . ; though the making of such grants, and by that means appropriating what seems unnatural to restrain, the use of running water, was prohibited for the future by King John's great charter: and the rivers that were fenced in his time were directed to be laid open. . . . This opening was extended by the second and third charters of Henry III to those also that were fenced under Richard I: so that a franchise of free fishery must be at least as old as the reign of Henry II.

SIR W. BLACKSTONE, *THE COMMENTARIES ON THE LAWS OF ENGLAND* 33-34 (4th ed. 1876) [Hereinafter cited as BLACKSTONE, *COMMENTARIES*]. See also SCHULTES, *supra* note 7, at 76.

25. MOORE & MOORE, *FISHERIES* 12 *et seq.* See also W. McKECHNIE, *MAGNA CARTA* 435 *et seq.* (2d ed. 1914). Moore & Moore report extensively on the first known case citing Magna Charta in relation to this area. The Citizens of York attempted to block the Earl of Cornwall from imposing tolls and requiring fishing licenses in river waters they had long used free by custom. Although they did not mention the argument when the case was first adjudicated (in their favor on the grounds of custom) in 1280, when they petitioned Parliament on the same issue in 1314, they did argue that putting these waters

even Moore and Moore are forced to recognize that, historical accuracy notwithstanding, it is "now settled law that Magna Charta was the statute that prevented the creation of several fisheries in tidal waters" ²⁶ Chief Justice Taney of the U.S. Supreme Court earlier reached much the same conclusion in the benchmark case of *Martin v. Waddell*. ²⁷ This development is especially strange because, while Magna Charta Chapter 47 refers to rivers and not to tidal waters, the common law of England, presumably based on this Chapter, holds that there is no public right to fish in non-tidal waters, even though navigable, notwithstanding such a right in tidal areas. ²⁸

D. *Transition to the Modern Law*

Although Magna Charta surely did not go so far as it has subsequently been held to have gone, it was nonetheless a step in the direction of greater regulation of waterways in the public interest. As England and English commerce continued to grow, statutes ²⁹ and case judgments continued to expand the public's rights in and control over the nation's water resources. Later theorists have attempted to bring this stream of developments together under a "public trust" theory of tidal and navigable waters. One such synthesis (by an ardent public trust proponent) follows:

[I]t cannot be construed that the king has any other legal tenure in the rights of fishery and navigation than belong to him in the character of *protector* of public and common rights. And hence it is that the king has no authority either to grant the exclusive liberty of fishing in any arm of the sea, or to do anything which will obstruct its navigation. The king, it is true, may grant the soil of any arm of the sea, . . . but the right of the grantee so derived is always subservient to the public rights before mentioned. ³⁰

In other words, public trust theory held that the public had certain important rights in the foreshore, which rights superseded any con-

in defense was "*contra tenorem Magnae Chartae*," Records regarding the final outcome of the case have been lost. MOORE & MOORE, FISHERIES 15-18.

26. *Id.* at 13. Note the emphasis on tidal waters notwithstanding Magna Charta.

27. *Martin v. Lessee of Waddell*, 41 U.S. (16 Pet.) 367, 410 (1842): "The question is not free from doubt, and the authorities referred to in the English books cannot, perhaps, be altogether reconciled. But . . . the question must be regarded as settled in England against the right of the king since Magna Charta to make such a grant [of several fishery, which includes the soil, in navigable waters]."

28. *Johnston v. O'Neill*, 1911 A.C. 552; *Pearce v. Scotcher*, 9 Q.B.D. 162 (1882); *Reece v. Miller*, 8 Q.B.D. 626 (1881). Alone of the American states, New Jersey still follows this rule.

29. Partially listed in HALE, D.J.M. 388-89.

30. J. ANGELL, A TREATISE ON THE RIGHT OF PROPERTY IN TIDE WATERS AND IN THE SOIL AND SHORES THEREOF 33-34 (1st ed. 1826). [Hereinafter cited as ANGELL, TIDE WATERS.]

flicting private rights, including those claimed by the King. The King was trustee for these public rights, but he could not appropriate them to his own use.

For centuries after Magna Charta there were few reported cases because tidal area resources were still generally abundant. As a result, public trust theory developed only very gradually. With the advent of the commercial and industrial revolutions in the early modern period, however, the pace of doctrinal development speeded up. Public trust proponents pushed to expand the scope of the citizens' existing easement rights and to "rediscover" new categories. For a variety of practical and historical reasons discussed below, the dominant approach under the theory was to reserve a series of particular rights to the public, and thus to limit the prerogatives of private ownership.

This "easement" approach is theoretically inconsistent with the traditional Roman concept of common ownership by all the citizenry. It presumes private ownership, which the Roman model denies. This theoretical difference, however, has prevented neither coexistence nor confusion of identity. The Courts have never forsaken the theory of ancestral Roman law, and the Roman approach recently has been gaining ground in practice. In case by case adjudication of controversies between putative owners and other citizens, the broader principles of the Roman model can only lend support to a claimed easement under the public trust theory.

The theoretical frictions which had previously existed between the Roman and public trust models were aggravated by pressures brought to bear by *laissez-faire* liberals and their commercial allies. Whereas both Roman and public trust models called for the state to act as trustee for the public interest, *laissez-faire* theorists wished to do away with feudal encumbrances and to rely instead upon private ownership and the market's invisible hand.³¹ There was a greater perceived need for doing away with irrational feudal regulation and for widening assured access to tidal resources than for regulating the proposed multiple use. This historical movement, coming as it did at a period of especially rapid growth in the public trust theory, strongly reinforced the theory's existing tendency to develop in the framework of a series of public easements imposed on a largely private fee ownership system

31. This is the position reflected, for example, in MOORE & MOORE, FISHERIES and MOORE, FORESHORE. The argument was given great impetus by the 1849 speech of Mr. Sergeant Merewether representing the City of London against the Crown, reproduced in HALL, *supra* note 9, Appendix. See also *Blundell v. Caterall*, 5 B. & Ald. 263 (1821); *Ball v. Herbert*, 3 T.R. 253 (1789).

rather than that of public ownership through the state (a model subsequently followed in many socialist societies).³² Although, given the subsequent advent of democratic government, this early Liberal bias is no longer a necessary block to government trustee ownership, social policy against overcentralization continues to argue for a similar result.

The minimum necessary easement approach to protecting the public trust became the chosen way for other reasons as well. Because large portions of the tidal areas and navigable rivers had already become private property in Britain, it would have been difficult or impossible for the courts to expropriate them. To reclaim these lands for the public would have been unfair to the current owners (especially to b.f.p.'s), many of whom had invested in improvements. Moreover, even disregarding the predictable reaction of the King, one of the realm's largest property owners, such court intervention would have encountered insurmountable political opposition. On the other hand, custom sanctioned at least some of the desirable public easements, definitely including navigation, long the most important of the rights from a social point of view. To sanctify, refurbish, and defend against encroachment what was in any case customary was much more feasible. Easements also proved a much more flexible tool than fee interests because they are defined in terms of activities, not land. An acre is an acre, but "navigation" or "commerce" can be defined in various ways. Such flexibility, even if purchased at the cost of some uncertainty, better enables judges to match law and justice, case by case. The easement model is also sufficiently loose-jointed to appear to encompass the complex and often inconsistent set of customary relations and rights that had come into existence well before a theory was needed to explain them.³³

Furthermore, by allowing continued private ownership, the state avoided great unnecessary expense, both in terms of maintenance and regulation. Much of any country's tidal areas are still not in need of detailed regulation to assure effective and fair resource allocation and maintenance;³⁴ statutorily regulated private ownership will do the job.

32. The Liberal easement approach sought to define specific areas of the public interest that were to take priority over the King's interests, definitely including the *jus publicum* of navigation and, with declining certainty, those of free fishing, sand, seaweed, bathing, etc. The old Roman model, still with followers, by contrast suggested that the tidal areas were not the Crown's to alienate. State ownership is close to the Roman position except that it makes regulation easier.

33. The concept of a "public," for example, would have been virtually unintelligible to the men who molded many of these traditional relationships.

34. Private owners along the shore have since Roman times been held liable for maintenance of the banks and of seawalls. Lord Hale, *First Treatise* (ca. 1786) (a manu-

A final reason for the adoption of the easement approach, although there is no proof that it was actually considered, was its usefulness as a salami tactical method of returning to the old Roman position of total common ownership. By gradually expanding the definition of existing easements and by possibly adding others, it is quite possible that the law could cause private ownership to fade away so completely that the result would ultimately be equivalent to expropriation.³⁵

Should the salami tactic of returning tidal areas to common ownership by gradually expanding the scope of public easements on private ownership prove successful, the many significant elements of the original Roman approach that remain imbedded in the common law will have been partly responsible. If the new dominant easement approach proves incapable of such expansion or of providing adequate protection, the currently recessive Roman theory (or its close relative, state ownership for the benefit of the public) does provide a "principled" alternative to private ownership.

Notwithstanding widespread *de facto* alienation and doctrinal inconsistencies with the public trust easement theory,³⁶ the alternative Roman approach retained a footing within the common law over the centuries. Even though the law was often forced to recognize that the shore had been acquired by grant, prescription, or a combination of the two,³⁷ both courts and academic writers continued to hold that it was *prima facie* in the Crown.³⁸ The Crown's interest, moreover, was widely perceived to be the people's. In a close consideration of conflicting interests in the Brighton seashore, for example, Mr. Justice Bayley held that to the extent that tidal areas are the King's, they are held in trust for

script published in MOORE, FORESHORE 318, 360, 366.) [Hereinafter cited as HALE, FIRST TREATISE.]

35. That this is the direction towards which public policy beckons is suggested by ORE. REV. STAT. § 390.610, which seeks "to forever preserve and maintain the sovereignty of the state heretofore existing over the seashore and ocean beaches of the state" This statute claims to be based on public easements by prescription for recreational purposes. *Id.* § 390.610(2), (3).

36. In England the alienation is explained by prescription and the theory of "lost grants"; in the United States by prescription and the state governments' power of grant and sale (especially if some public purpose can be certified or if, as in Massachusetts, public easements are retained). In 1641 the Massachusetts legislature granted the Colony's shore down to the extreme low water mark to riparian owners subject to easements for public passage, navigation, and fishing.

37. 2 BLACKSTONE, COMMENTARIES 220, 222; *Simpson v. Corporation of Godmanchester*, 73 LAW TIMES 90, 95 (1882). Moreover, Parliament has the power to extinguish the public trust by grant or in any other way it sees fit. H. WOOLRYCH, A TREATISE ON THE LAW OF WATERS 272 (Phil. ed. 1853). *Cf.* SCHULTES, *supra* note 7, at 60.

38. HALE, D.J.M. 376, 378-79; GOULD 12-13. "By the present [1900] law of England, the Crown has the right of property in the areas and inlets of the sea within the realm. . . ." GOULD, *supra* note 1, at 8.

the public.³⁹ With the American Revolution, this sovereign representative proprietorship passed to the citizens of each state.⁴⁰ One way of "rediscovering" and developing this ancient Roman heritage would be through traditional trust theory, following language in the important *Illinois Central R.R. v. Illinois* case⁴¹ to the effect that "[t]he State can no more abdicate its trust over property in which the whole people are [beneficially] interested . . . than it can abdicate its police power"⁴²

E. Historical Summary

Before considering several aspects of the content and scope of the contemporary common law of tidal areas, a brief overview of the centuries of eddying doctrinal development discussed above may help clarify the historical pattern. Figure 1 illustrates doctrinal history in relation to the ratio of demand for tidal resources to the supply.

Although the Roman model has never been entirely abandoned, drastic changes in political, social, and commercial order during the Dark Ages made the concept of common ownership of tidal resources as a whole untenable. When commerce and the use of tidal areas began to revive, the law followed by developing the easement public trust model. Subsequently, as the demand for tidal area resources accelerated, the public trust theory's armory of easements grew. This process was held back during the *laissez-faire* period as theorists concentrated on unseating unsatisfactory trustees in favor of private owners and the Invisible Hand.⁴³ However, over the centuries the extent to which

39. "[I]n general, the crown has the right,—not with a view to the private reservation to collect the stones for itself, or to collect the sand for itself, but for the general interest of the public; and, if you can, without interfering with and prejudicing the interest of the public, remove the sand and the stones, the crown will not interfere." *Dickens v. Shaw*, (K.B. 1822), reproduced in HALL, *supra* note 9, Appendix xlv, ix. This case was fought between the traditional feudal Lord of the Manor, who claimed the shore but who had not exercised use and control adequately to prove his claim, and various private individuals who sought to defend their right to take sand and stones from the shore for use in construction activity in the rapidly growing city of Brighton. The interests of fishermen and swimmers were also raised. Such a conflict would not have arisen in an earlier day when tidal resources were so plentiful that no profit could be had from claiming and selling them and no serious conflict of uses was probable.

40. "For when the Revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution to the general government." *Martin v. Waddel*, 41 U.S. (16 Pet.) 367, 410 (1842). (Emphasis added.) This is a position not far removed in theory from that of Roman common ownership.

41. 146 U.S. 387 (1892).

42. *Id.* at 453. Such development is proposed in Berlin, Roisman & Kessler, *Law in Action: The Trust Doctrine*, mimeo available from the Conservation Foundation, 1250 Connecticut Avenue, Washington, D.C. Prepared for the Conference on Law and the Environment, Sept. 1969.

43. The Roman law made the foreshore common property and the state trustee. The

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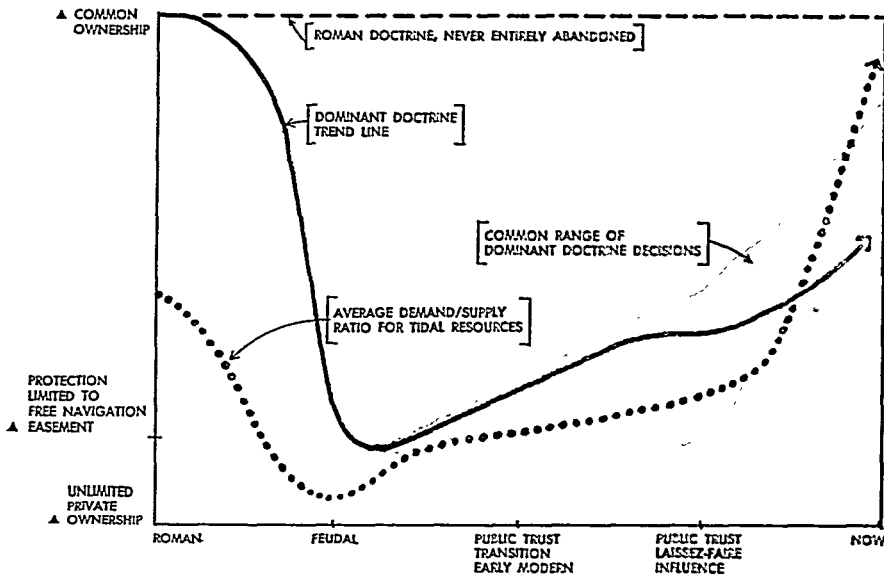


Figure 1

the public's interests have been recognized in the law has correlated directly with changes in the ratio of the demand to the supply of tidal resources.

The current situation is unsatisfactory. The protection afforded the public interest in tidal areas lags behind an exploding demand/supply ratio. (See Figure 1). In part because of this lag, and in part because of its history, tidal doctrine is over-complex, if not confused. It is difficult for a "principled" set of rules to be adequately flexible when faced with rapidly changing conditions. Change is apparent, however, and its direction is clear. From the time of Magna Charta public interests in the foreshore have grown, and they have been increasingly recognized in the law and protected by more adequate trusteeship arrangements. This trend suggests that case by case cost-benefit balancing may become more overt. Use of the Roman Model is a logical alternative to the easement doctrine, and one that may render superior justice. Although the law is reluctant to admit making particular decisions on cost-benefit grounds, it has established doctrines from period to period with such considerations pre-eminently in mind. The greater the restrictions on private ownership, with consequent reduction in its rigidities, the greater scope there is for such balancing by the state

laissez-faire theorists wanted the foreshore to be held by private owners, albeit admitting minimal easement restraints, and they would have eliminated the trustee entirely.

as widely-empowered trustee (or owner). Trusteeship of a wide range of rights (the expanded easement theory model) or trusteeship "in the public interest" (moving towards the common ownership model), which are the two most likely alternative lines of public trust development, both leave the trustee with the duty to consider all relevant variables in exercising a broad maximizing discretion. If one analogizes to existing trust doctrines, the courts would intervene under such a system only if the trustee was not maximizing the beneficiaries' interests (*e.g.*, by ignoring important public interests currently protected by easements). That is to say that the state would be active trustee, and the courts would require and enforce cost-benefit balancing by the state.

II. The Central Elements of the Common Law of the Foreshore

As the history of its development would suggest, the current law of tidal areas is hardly a Cartesian product. It straddles different and sometimes inconsistent goals; it has ill-defined boundaries; it encompasses more or fewer interests at different times and places; the degree of enforcement varies depending upon the balance of interests asserted, when, for whom, and where; and, as already mentioned, there is considerable ambiguity regarding the state's role as trustee and regulator. In the United States, moreover, there is almost anarchic doctrinal diversity from jurisdiction to jurisdiction,⁴⁴ making generalized comment perilous.⁴⁵

In what follows we will try nonetheless to blueprint doctrinal patterns in the complex common law of the foreshore. Our primary focus will be on the extent of and balance between public and private interests. We will also briefly consider how the American federal system affects the question of "Who is the public?", and we will conclude with an even shorter review of the remedies traditionally available when the public trust is infringed.

44. For a summary of the law in each of the original thirteen colonies, see *Shively v. Bowlby*, 152 U.S. 1, 18 *et seq.* (1893). For a consideration of the current state of general public trust law in Massachusetts, Wisconsin, and California, see Sax, *supra* note 5, at 491.

45. "[T]here is no universal and uniform law upon the subject; . . . each State has dealt with the lands under the tide waters within its borders according to its own views of justice and policy . . . Great caution, therefore, is necessary in applying precedents in one state to cases arising in another." *Shively v. Bowlby*, 152 U.S. 1, 26 (1893). "But in most of the Atlantic States, the common law doctrine has been in some respects very materially altered and modified by *Statutes, grants and usage*." ANGELL, *TIDE WATERS* 49.

A. *The Grounds for and the Extent of Private Interests*

In today's developed society, the most common method of acquiring a property interest is from a prior owner. Such a vendor may be either a person or a government acting as a private owner. Unfortunately many governments have confused their roles as private owner and sovereign trustee of public interests and have attempted to give or sell portions of their trusteeship powers along with alienable interests. Although some such distributions have since been sanctified by judicial myth-making⁴⁶ and/or by prescription,⁴⁷ they are theoretically invalid.⁴⁸ Where courts and commentators have refused to let time justify such excessive distributions,⁴⁹ this refusal is based both on considerations of public policy and, at least for the easement of free navigation, on the exercise of a right uninterrupted since the period of Roman common ownership.⁵⁰ Even if the uncertainty created by such possibly faulty initial transfers of title from government is not immediately involved, to trace private title back to prior private ownership, however, does not provide sure justification for the original transfer into private hands. Not only does such an attempted defense of private interests fail to deal with the difficult historical fact of Roman common ownership, but it does not explain the creation of new interests in already-claimed tidal areas or the claiming of abandoned or previously unclaimed areas, notably in the New World.⁵¹

Gradually, the common law has come to recognize the weaknesses of this justification for private alienation and consequently to emphasize

46. See p. 776 *infra*.

47. See p. 776 *infra*.

48. "Public rights, and such things as are materially related to them, are unalienable, and this important doctrine was established by the early lawyers. The rule laid down by Bracton is that things which relate peculiarly to the public good cannot be given, sold, or transferred by the king to another person, or separated from the crown . . . The same rule was admitted by the feudal law." SCHULTES, *supra* note 7, at 10. "[N]otwithstanding a grant, if the public interest be invaded, or the privileges of the people narrowed, the grant pro tanto is void" WOOLRYCH, *supra* note 37, at 449. See also *Att'y Gen. v. Parmeter*, 10 Price 378 (1811). But cf. Sax's warning that many such statements in American state cases have been statements of judicial philosophy and not holdings. Sax, *supra* note 5, at 473, 485-86.

49. "[N]o length of time will legitimate a public nuisance, so that the acquiescence of twenty years on the part of the public in an interruption of their rights, occasioned by the illegal act of an individual, will not divest these rights, nor prevent the community from proceeding to abate or remedy the nuisance under which they may chance to suffer." WOOLRYCH, *supra* note 37, at 206.

50. "When a nuisance concernes immediately al men, as the obstruction of a port, the makeinge of a weare in a publique river; this can neither bee licensed or dispenced with, though the Kinge and the owner of the soil of the river should consent thereunto, bycaus it is immediatly a common nusanse, and all are directly or immediatly concerned in it." HALE, *FIRST TREATISE* 340.

51. See pp. 771-72 *supra*.

prescription increasingly. The common law allowed private prescription (and recognized ancient grants reinforced by use), albeit initially only of incorporeal rights (e.g., a right of way as versus title),⁵² by creating the elaborate fictions of usage from time immemorial (*i.e.*, from at least the reign of Richard I), or of a "lost grant" of equal antiquity.⁵³ The requirements of great antiquity, logically impossible for the United States, have gradually been dropped even from the fictions. Now twenty years prescription in general and sixty years against the state is all that is generally required for private alienation. Similarly the limitation to incorporeal rights, based on the early formalistic concept of seisin,⁵⁴ is now little more than an historic shadow. Lands and rights long held by individuals, and generally improved by them, are in fairness and public policy better found to be theirs than the property of long neglecting paper owners.⁵⁵

The rule of thumb applicable to prescription under the more modern common law has been that the citizen could gain by "user" whatever there was in the tidal area that was not reserved for the people by easement under the public trust theory.⁵⁶ Acts of ownership that have been held to provide the basis for prescriptive title include building embankments and filling in parts of the shore, building wharves, piers, access ramps, etc.⁵⁷ Thus, those claiming to own tidal areas, unless they previously had long allowed the grant lands (or part of them) to lie idle,⁵⁸ have a solid claim to whatever they have actively

52. 2 BLACKSTONE, COMMENTARIES 220-23.

53. 1 BLACKSTONE, COMMENTARIES 75; 2 *id.* at 220; *Simpson v. Godmanchester*, 73 LAW TIMES 90, 92 *et seq.* (1882); *Dalton v. Angus*, 44 LAW TIMES 407. *Cf. State ex rel. Thornton v. Hay*, 89 Ore. 887, 897 n.5 & 899-900 (1969).

54. *See, e.g., HALL, supra* note 9, at 37-38; J. JERWOOD, A DISSERTATION ON THE RIGHTS TO THE SEA SHORES AND TO THE SOIL AND BED OF TIDAL HARBORS AND NAVIGABLE RIVERS 30-31 (1850).

55. *See pp. 769-70 supra.*

56. "A subject that hath not the franchis of the port, yet hee may by usage and prescription have the very soyl and channel of a navigable river, creeke, or channel wherein the sea flowes and reflowes, nay though it bee constantly salt water at low water . . ." HALE, FIRST TREATISE, *supra* note 34, at 353. *See also* HALE, DE PORTIBUS MARIS, Ch. IV.

"[T]he king is lord of all the land between high and low-water mark; . . . and there are instances [in addition to royal grants of such land] in which this right is obtained, not from grants from the king, but by long prescription." *Dickens v. Shaw*, (K.B. 1822), reproduced in HALL, Appendix.

57. MOORE, FORESHORE 660.

58. Grantees of tidal area lands or rights run a double risk if they long let their grants be idle—first that of failing to add prescriptive insurance to their title, and second and more serious, that of voiding their original grant. Three important cases concerning improvements (a drydock and wharf) made on the shore of Portsmouth Harbour and concluding in an order to abate these investments turned on the long gap that had taken place between the start of construction in 1785 and the grant made in 1628—even though the harm to the harbor was minimal. The Crown had, the court held, made the grant with the implied condition of certain improvements being made, which were not done within a reasonable time. The long lapse of time was "not what the Crown expected

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possessed that does not conflict with public trust easements, irrespective of the validity of the original grant.⁵⁹ There are, however, certain limits to the prescriptive rights thus allowed.⁶⁰ The requirement of adequate user, consistent with any controlling grant, is the clearer of the two main limitations on prescription. The other—that certain interests reserved to the public cannot be alienated into private ownership in any way—is a morass of confusion.

B. *The Competing Public Interests*

public trust theory. They are: navigation; ports; free passage (as a means

At least ten different categories of interest in tidal areas have been claimed at one time or another to be protected for the people under

when it contemplated that there should be an undertaking and attempt . . .” Att’y Gen. v. Parmeter, 10 Price 378, 407 (1822). See also *id.* at 406-11; Att’y Gen. v. Burrighe, 10 Price 350 (1822); Att’y Gen. v. Richards, 2 Anstruther 603. These cases specifically limited their holding to one part of a *much* larger grant which included portions that the courts indicated would not be overturned. If portions of large land grants made to private owners were left similarly undeveloped until relatively recently, the grant might be considered voided as regards those portions on the grounds that the grant was made with an understood developmental purpose and condition and that this condition was not met. For conservationists or others seeking to overturn old grants (made with abandon in earlier frontier days by the American state legislatures, generally with the intent of encouraging development), this implied condition theory is attractive because it allows the courts to reach the desired conclusion without forcing them to do anything more drastic in terms of “making law” than interpreting specific old statutes that have no significance broader than the title in controversy.

Further, by tracing back the common law theory of “lost grant” upon which prescription is supposedly based, one can challenge even prescriptive claims based on ancient and continuous use if the claim is to a right or use clearly inconsistent with the authorizing grant. Thus, for example, a mill could not enforce a claim based on long use to water from a British canal because the act creating the canal specified that it was to serve a public purpose while the miller’s use was private. *Rochdale Canal Co. v. Radcliffe*, 18 Q.B. 287. If, or to the degree that, private tidal property owners argue prescription as a basis for their claims, their theory is a common law theory based on the fiction of lost grant. [Intervening illegitimate grants do not affect the validity of this mythical original grant. *Simpson v. Corporation of Godmanchester*, 73 LAW TIMES 90 (1882).] If the property in question is in a port, this lost grant would have to conform to the special limitations imposed on all grants of ports (of which more below). Blackstone describes one of the most important of these restrictions as follows: “But though the king had a power of granting the franchise of havens and ports, yet he had not the power of resumption, or of narrowing and confining their limits when once established but any person had a right to load or discharge his merchandise in any part of the haven . . .” 1 BLACKSTONE, COMMENTARIES 234. See also *Dickens v. Shaw* (K.B. 1822), quoted *supra* note 39.

59. There is some question whether prescriptive claims can extend beyond the low water mark. On the theory that since these lands are never dry and hence never available for prescriptive use, Woolrych suggests that these lands are not subject to prescription. WOOLRYCH, *supra* note 37, at 54. However, Lord Hale, speaking for what is now majority opinion, suggests that this soil can in fact be occupied, e.g., by weirs, and that it is therefore susceptible of prescription. HALE, D.J.M., *supra* note 1, at 389; see also *Benest v. Pipon*, 1 Knapp P.C. 60 (1829), holding that there can be no exclusive right to seaweed (considered an incident of the soil) below low water without a royal grant or prolonged user. If there is any doubt about the possibility of ownership below low water facing the open sea, however, there is little question regarding the permissibility of prescription in harbors, bays, and other enclosed (*inter fauces terrae*) bodies of the sea. HALE, FIRST TREATISE, 352.

60. See note 58 *supra*.

to another protected activity); commerce; fishing; sand and stones; seaweed and shells;⁶¹ bathing (recreation); conservation and aesthetics; and the "public interest".

Public trust theory characterizes a given right either as being fully protected or as not being protected at all. A brief consideration of the variety of interests potentially involved should cast instant doubt on the viability of this approach. By and large, the above list encompasses a series of possibly protected activities and rights, many of which are likely to conflict. For example, completely unrestricted exercise of free navigation and commercial use will almost certainly conflict with bathing, conservation, fishing and sometimes even with the collection of seaweed and stones. An ordering of priorities is necessary between the different rights as well as *vis-a-vis* other claims. The different claimed rights have different social weights. Thus, the right to unencumbered navigation will usually assume a higher value than the right to collect seaweed on the shore. The weights can be debated, and they will change as social conditions change;⁶² but they are indisputably not all equal.

The fact that the rights involved are not homogeneous or of equal weight, while the public trust theory suggests that they are, leads to confusion.⁶³ This confusion is compounded by the fact that some of the lesser rights have at times been officially protected, while at other times they have not; and that even the core rights, which have always

61. Important primarily for use as fertilizer.

62. For example, the importance of conservation/aesthetics and of bathing/recreation are no doubt both greater and better recognized now than at Lord Hale's time.

63. Can, for example, a several fishery arise from user? Or is the public right of fishery one of the rights inalienably reserved for the people in common? On the one hand the public right of fishery is constantly mentioned in the same breath with the undeniably inalienable right of free navigation in most lists of what is covered under the public trust (see, e.g., *Martin v. Waddell*, 41 U.S. (16 Pet.) 367, 413 (1842); *Brinckman v. Matthey*, 2 Chancery Division 313, 315 (1904); *ANGELL, TIDE WATERS* 21, and there are many important authorities that say directly that it is so protected. *ANGELL, TIDE WATERS*, 21; *HALL, supra* note 9, at 42; *SCHULTES, supra* note 7, at 10. But see *MOORE & MOORE, FISHERIES, passim*. In the words of Huddleston, B.: "[T]he whole current of authorities in this country and in Ireland [is] that, when a river is navigable and tidal the public have a right to fish there as well as to navigate it" *Pearce v. Scotcher*, 9 Q.B.D. 162 (1882).

If fishery is protected by the public trust equally with navigation, then it must follow that several fisheries cannot be acquired by prescription. However: "But though an exclusive right of fishing in the sea and navigable streams cannot be established by grant, . . . yet we find many instances of such a right being established by *prescription*" *SCHULTES* 68-69.

This outburst of apparent theoretical madness, however, cannot in fairness be blamed on prescription theory. The confusion lies instead in public trust theory, which has never clearly defined what rights, in what degree, it covers. If fishery was in fact as clearly and fully protected by the public trust theory as is the right to unimpeded navigation, there would be no question of individuals being able to prescribe exclusive several fisheries.

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been encompassed by the theory, have been enforced with differing degrees of rigor from time to time.⁶⁴

The different degrees of enforcement (and implied importance) that have been associated with various protected "public trust" rights (and thus the implied importance of these rights) can best be comprehended with the help of a table. Note that even with its broad classifications there is room for variation—thus, for example, what is navigable can be defined in terms of rowboats at high spring tides or in terms of modern ocean liners.⁶⁵

TABLE 1
TIDAL PUBLIC TRUST RIGHTS
(as measured by degree and scope of enforcement)

	Maximum			Low
A. Point at which hindrance of the right can cause judicial intervention	Absolute standard. Any infringement or change of <i>status quo ante</i> a violation. No offsetting consideration allowed.	Jury determination if any infringement (nuisance). No offsetting consideration allowed.	Balancing. Jury question of nuisance but offsetting benefits considered.	Threatened extinguishment of protected right required before court action invocable.
B. Beneficiaries protected	All people	All National Citizens	Provincial or State Citizens	Local Customary Users
C. Waterways where the right is protected.	All, including non-navigable & non-tidal	All tidal and navigable	All tidal	In ports only

Public trust theory has not adequately protected all of its proper interests because of its failure to give consistent theoretical meaning to the word "absolute" when it is used to characterize different easements. "Absolute" can have, and persistently has had, several different meanings in the public trust context. Oversimplifying and temporarily ignoring overlap, there are roughly three different ways in which public trust easements can be "absolute".

- (1) One particular right may be singled out as being absolute (generally navigation). Of necessity, no other interest logically can be absolute at the same time. However, several important interests can be ranked hierarchically—with number two being "absolute" except when in conflict with number one,

64. See Figure 1, p. 773 *supra*. They have also been enforced differently from place to place. For example, one can fish in many non-navigable waters, but the law doesn't protect the angler if the area is either tidal or navigable. See, e.g., *People v. Platt*, 17 Johnson Rep. 195. Similarly, the whole emphasis on special added protection in ports (see *infra*) is based on just such geographic differentiation.

65. Compare *Parmeter v. Gibbs*, 10 Price 412, 422 (1813) (a rowboat at high tides) with *Shaw, C.J.*, in *Rowe v. Granite Bridge Corporation*, 21 Pick. 344 (1839) (must be navigable for purposes useful to trade and agriculture). See also *Sax, supra* note 5, at 556, and *Collins v. Gerhardt*, 237 Mich. 38 (1926).

and so on. Other interests may be protected by non-easement (e.g., local custom) means, or they may be denied protection altogether.

- (2) Absolute is used synonymously with unextinguishable. There is no set rule regarding priority when interests clash, but public trust easements cannot be ignored or extinguished.
- (3) The package of all public trust interests is absolute *vis-a-vis* any and all conflicting private interests, but the balance between conflicting public easements must be struck on a case by case basis.

Model (1) historically has been the most widely used. This has been so because, for a limited number of easements, it provides the surest, the most predictable, and the most mechanical guide to judicial action.⁶⁶ However, this usage can have ill effects. For example, certain "lesser" protections will be defined as separate from the public trust theory so they may co-exist logically alongside the greater protections.⁶⁷ More seriously, the courts may be over-cautious in recognizing important public interests in tidal areas because they feel that recognition would entail protecting the interest to the same degree as the prototype (and most vigorously defended) public trust theory right—navigation.

As more interests are taken into consideration, as they have been and will have to be in our increasingly congested environment, the mechanistic advantages of this first use of "absolute" turn increasingly into costly rigidities that distort the weighing process for doctrinal reasons. This inadequacy has led the law to slide somewhat over to Models (2) and (3), neither of which provides formulae solutions to cases. Especially to the extent that Model (3) "public" easements are defined to include most legitimate private interests,⁶⁸ this shift represents a reluctant and somewhat covert movement by the courts towards greater case by case cost-benefit analysis.

For those who believe in the need for greater protection of the public's interest in the foreshore, Model (3), the public trust package, promises better results than Model (2). In either case most regulation will be done by the executive.⁶⁹ While Model (2) requires in theory

66. The public trust theory's failure to differentiate between, and settle upon, any of several possible meanings of "absolute" can probably best be explained in terms of the easy analogy made between public trust "easements" and the familiar property concept of the same name and concerned with very similar object matter. [See TAN 55 *supra*.] The courts' reluctance to indulge in overt cost-benefit analysis has no doubt discouraged attempts to pierce the analogy. See also Sax, *supra* note 5, at 478 *et seq*.

67. See p. 784 *infra*.

68. See, e.g., p. 783 *infra*.

69. See, e.g., p. 785 *infra*.

that public trust easements be considered, it seems to leave injured members of the public with the virtually impossible burden of proving that the executive did not consider their easement rights in arriving at particular decisions. Model (3) by contrast creates a presumption that the public interest will be recognized, leaving the injured member of the public with the much easier task of showing that his public right has been violated and placing on the state the burden of proving an over-riding public interest. Moreover, Model (3) keeps much more widely open the option of an eventual return to Roman common ownership by means of the already discussed gradual, "salami tactic" reduction of private interests in the foreshore.⁷⁰ The main disadvantage of Model (3) is the danger that it might lead society to reach resource allocation decisions underweighing private interests. However, under present circumstances, the danger that acceptance of Model (2) might leave important public interests without effective judicial recourse seems more grave.

C. *A Catalogue of Public Trust Theory Easements*

A brief catalogue⁷¹ will serve to illustrate the preceding generalities regarding the variety of interests involved and to suggest traditional and currently dominant views of the status of claimed public rights, including their prospects for future growth.

Navigation. The oldest and most completely developed of the rights, the right to navigation, is clearly an easement. In Lord Hale's words, waterways "are in nature of comon highwayes, in which all the Kinges people have a liberty of passage"⁷² The easement includes secondary easements, such as the right to anchor,⁷³ but the old right to tow from the banks was ended by *Ball v. Herbert*.⁷⁴ Of all the public trust rights, navigation is the only one that has remained unchallenged and rigorously enforced⁷⁵ from Roman times to the present.

In dealing with impediments to navigation, no countervailing benefits will be considered. In an opinion ordering the abatement of an embankment and wharf built on a recess of the Thames that was "not covered with water for eighteen hours out of the twenty-four,"⁷⁶

70. See p. 771 *supra*.

71. See pp. 777-78 *supra*.

72. HALE, FIRST TREATISE 339. See also *Orr Ewing v. Colquhoun*, 2 App. Cases 839 (1877).

73. *Gann v. Free Fishers*, 11 H.L. 192, 217-19 (1865).

74. 3 T.R. 253 (1789).

75. The introduction of evidence regarding the obstruction of navigation has been favored under some circumstances. *King v. Clark*, 12 Mod. 615 (1701).

76. *Rex v. Lord Grosvenor*, 2 Starkie 511, 513 (1819).

the court held that evidence of favorable effects of the alteration was irrelevant, "The question here is, whether a public right has not been infringed."⁷⁷ Similarly, in *Regina v. Randall*, the court instructed the jury to say

whether the wharf itself occasioned any hinderance or impediment whatever to the navigation of the river by any description of vessels or boats; and told them that they were not to take into their consideration the circumstance that a benefit had resulted to the general navigation of the river⁷⁸

Some courts have used language suggesting that any hindrance to navigation in whatever degree is *ipso facto* prohibited. The court's use of the word "whatever" in the above quote from *Randall* provides one such example. However, it is clear that this is not a universal rule⁷⁹ and that in any case Parliament, Congress, or a state legislature can authorize improvements that adversely affect navigation.⁸⁰ The degree of absoluteness with which the right to free navigation is enforced is one of the few ambiguities and variables associated with the right.

Ports. The right of the public in ports is closely connected and similar to its right to free navigation, except that it is policed even more vigorously⁸¹ and that it gives particular stress to unhindered access to shore facilities for loading and unloading. Lord Hale lists several nuisances particular to ports, including silting or clogging a harbor with rubbish, wrecks, anchors, etc.; allowing the decay of landing facilities such as wharfs; the building of weirs or other impediments to navigation and moorage in a harbor; and the building out of a port into areas where ships previously could moor.⁸²

Passage. Citizens generally have the right of passage over the shore when passage is connected with protected rights, notably the rights of navigation and fishing.⁸³ Otherwise the property rights of private

77. *Id.* at 513. The Corporation of London as conservator of the river had approved the change.

78. *Regina v. Randall*, 2 CARR. & M. 606, 607 (1842). See also *Parmeter v. Gibbs*, 10 Price 412, 419, 422 (1822); *Rex v. Ward*, 4 Ad. & El. 384 (1836); *Respublica v. Caldwell*, 1 U.S. (1 Dallas) 150 (1785).

79. HALE, DE PORTIBUS MARIS 85. Moreover, the law is very clear that the right of free navigation may not be pursued to the harm of other interests unnecessarily. *Post v. Munn*, 1 Southard 61 (1818); GOULD, *supra* note 1, at 178.

80. GOULD 47 & 275; WOOLRYCH, *supra* note 37, at 271.

81. HALE, FIRST TREATISE 345; HALE, DE PORTIBUS MARIS chs. 2, 3, 6 and 7.

82. HALE, DE PORTIBUS MARIS, ch. 7. See also 1 BLACKSTONE, COMMENTARIES 234. The cases do not seem to follow the commentators in treating ports specially, but rather deal with obstructions under the general right of navigation rule. See, e.g., the Portsmouth Harbor cases, note 58 *supra*.

83. "As incident to the right of public fishery in tidal waters there exists the right of fishing over the foreshore when it is not within the limits of a several fishery, and of

owners take precedence.⁸⁴ One could argue from a few minority sources and the general rule that grants from the sovereign of trust property will be construed narrowly to pass only what is specifically granted⁸⁵ and that a right of passage over the seashore was retained as such for the general public. The Massachusetts Act of 1641 granting property ownership of the shore to riparian owners specifically retained a public easement of access over unimproved shorefront.⁸⁶

Commerce. American cases referring to the public trust theory usually list navigation, commerce, and fishery as the three exemplary ingredients. Although there were some suggestions of this idea in the older common law,⁸⁷ they were hardly stressed. Since "commerce includes navigation,"⁸⁸ the added category may be considered primarily an enlargement, with potential for expansion, of the closely related concept of navigation. However, its very breadth limits its probable impact; courts will presumably be reluctant to restrict one commercial interest for the benefit of another. About all it clearly and logically excludes is an interfering private holding that prevents any use.

Fishery. The right to fish is a public right subject to private invasion, primarily by prescription although initially in early England also in large degree by grant.⁸⁹ In case of conflict with the right of navigation, the latter is paramount.⁹⁰

The status of the right to fishery has long been one of the most uncertain areas of the public trust theory. In large part this has been

laying lines, drawing nets (not being of the nature of fixed engines) over it, and presumably of drawing nets on the beach above ordinary high water mark in the act of fishing. It does not extend to the right of fixing stakes or fixed engines on the foreshore nor of drawing up boats above high water mark (except in case of peril and necessity), and leaving them there for future use. Such rights would be inconsistent with the right of private property." MOORE & MOORE, FISHERIES, 96. The Oregon Supreme Court has recently held that the "dry sand area" above the tidal area proper is by long custom a "recreational adjunct" of the foreshore area, open to the public both for pleasure and for access to the foreshore proper. *State ex rel. Thornton v. Hay*, 89 Ore. 887, 890-91 (1969). The old Roman law had defined the seashore as running up to "the limit of the highest winter flood" (JUSTINIAN, INSTITUTES 2.1.1) and not just the mean high tide generally accepted by the common law. Thus *Thornton*, even though continuing to recognize the old mean high tide line in its argument, seems to move substantively closer to the Roman position in its definition of the area subject to public rights as well as in its recognition of a public interest in recreation.

84. *Blundell v. Catterall*, 5 B. & Ald. 268 (1821).

85. *People v. California Fish Co.*, 166 Cal. 576, 597, 138 P. 79 (1913).

86. GOULD, *supra* note 1, at 332-36.

87. For example, although the King is not allowed to issue duplicative franchises for markets or ferries, "yet in the case of a port of the sea, bycause that is a franchise of a more publique concernement, . . . to the realme in respect of safeguard and commerce here; though the subject hath a port, yet the Kinge may, as it seemes, erect another port neare to the former" HALE, FIRST TREATISE 351.

88. *Gilman v. Philadelphia*, 70 U.S. (3 Wall.) 713 (1865).

89. HALE, D.J.M. 376, 386-87; MOORE, FORESHORE 385.

90. MOORE & MOORE, FISHERIES 89; 1 KENT, COMMENTARIES 469.

due to the ambiguity regarding the relationship between the right to fish and the ownership of the underwater soil. Is the right an easement⁹¹ or a profit of the soil?⁹² Or, does the existence of the right raise a presumption of the ownership of the soil and vice versa?⁹³

Sand, Gravel, Shellfish and Seaweed. Where the soil remains in the sovereign, the people have a right to use it, especially when sanctioned in so doing by custom.⁹⁴ When the soil is vested in a private party, he has an exclusive right to the soil and what grows upon it.⁹⁵ Unlike seaweed still attached to the soil, some authorities allow the public a right to collect drift seaweed not on private property.⁹⁶

Bathing (Recreation). In the case of *Blundell v. Catterall*,⁹⁷ the previously open question whether there was a common law right to swim was decided in the negative, and access across a privately owned shore for this purpose was forbidden.⁹⁸ One reason given by the court was that swimming could conflict with navigation and fishery, and that it should have the lowest priority. Moreover, Lord C. J. Abbott noted that "public convenience is, in all cases, to be viewed with a due regard to private property . . ."⁹⁹ This exclusion from common law protection of an ancient and universal customary right is a prime example of the needless exclusion of an activity. Although swimming was not felt to be important enough to warrant the same degree of protection that was provided navigation and fishery, local custom often effectively reserved this right for particular sets of people,¹⁰⁰ as long as it did not conflict with priority public interests such as navigation.¹⁰¹

91. COKE, COKE UPON LITTLETON § 122a (8th ed. 1822); HALL, *supra* note 9, at 55 *et seq.*, 74.

92. MOORE & MOORE, FISHERIES 26.

93. Duke of Devonshire v. Neill, 2 L.R.Ir. 132, 171, 8 A.C. 152 (1877).

94. Dickens v. Shaw (K.B. 1822), quoted at note 39 *supra*. However, some such uses, for example dredging for shells, may conflict with other public trust interests commanding higher priority, for example fishery. See, e.g., Sax, *supra* note 5, at 553 *et seq.*

95. Martin v. Waddell, 41 U.S. (16 Pet.) 367, 421 (1842) (oysters); MOORE, FORESHORE 656. But see HALL, *supra* note 9, at 210.

96. GOULD, *supra* note 1, at 55 *et seq.* Drifting seaweed is the source of legal uncertainty for much the same reason that fish are—it is unclear what its relation if any is to the soil.

97. 106 Eng. Rep. 1191, 5 B. & Ald. 268 (1821).

98. Followed in Brinckman v. Matley, 2 Chancery Div. 313 (1904).

99. Blundell v. Catterall, 106 Eng. Rep. 1191, 5 B. & Ald. 268, 284 (1821).

100. On the Thames, the Westminster School boys had just such a customary right. In *State ex rel. Thornton v. Hay*, 89 Ore. 887 (1969), the Oregon Supreme Court expanded the doctrine of customary usage to cover general public use of the "dry sand" area for specifically recreational purposes. The Court took particular note of the fact that the custom had been viewed historically as limited in application to much less extensive and better defined groups of beneficiaries than "the public." *Id.* at 900 n.6. Nevertheless, it chose custom rather than prescription as the grounds for its holdings because the latter, when strictly construed, could not be generalized to the entire seashore where the former could. *Id.* at 897.

101. On another part of the Thames, the court found that boys swimming could be

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The increased need for recreational facilities along the shore has generated considerable pressure to reverse *Blundell*. Oregon has seized the customary usage opening and widened it.¹⁰²

In 1967 the importance of recreational and other non-navigational factors was recognized by the federal government. Previously the Army Corps of Engineers, required to pass on all projects possibly affecting navigable waters under the Rivers and Harbors Act of 1899,¹⁰³ considered the impact of proposed projects on navigability almost exclusively. In 1967 the regulations governing the granting of permits were modified as follows:

The decision as to whether a permit will be issued will be predicated upon the effects of permitted activities on the *public interest* including effects upon water quality, *recreation*, fish and wildlife, pollution, our natural resources, as well as the effects on navigation¹⁰⁴

Conservation and Aesthetics. The public interest in conservation is another area in which one can expect growth of the public trust theory. With the end of the frontier the need is obvious—and the job will not require judicial legislating. Almost all the elements of a public trust right of conservation in tidal areas have long existed, because it has long been recognized that adequate conservation is a necessary prerequisite to the enjoyment of protected activities. To quote Lord Hale once again:

Generally that which stopps the port or shokes it up, as castinge out of filth or ballast or otherwise, obstructs the passage of ships . . . or stoppage up a channel or rode, . . . are *prima facie* nuisances.¹⁰⁵

a nuisance to navigation. *Rex v. Lord Grosvenor*, 2 Starkie 511, 514 (1819). (Lord Abbott, C.J., again).

102. The Legislative Assembly recognizes that over the years the public has made frequent and uninterrupted use of lands abutting, adjacent, and contiguous to the public highways and state recreation areas and recognizes, further, that where such use has been sufficient to create easements in the public through dedication, prescription, grant, or otherwise, that it is in the public interest to protect and preserve such public easements as a permanent part of Oregon's recreational resources. Ore. Rev. Stat. § 390.610(2).

Ownership of the shore of the Pacific Ocean between ordinary high tide and extreme low tide, and from the Oregon and Washington state line on the north to the Oregon and California state line on the south, excepting such portions as may have been disposed of by the state prior to July 5, 1947, is vested in the State of Oregon, and is declared to be a state recreation area

Ore. Rev. Stat. § 390.720. See also *State ex rel Thornton v. Hay*, n. 100 *supra*.

103. 33 U.S.C. §§ 401-03 (1899).

104. 33 C.F.R. § 209.330 [emphasis added]. *But see Zabel v. Tabb*, 295 F. Supp. 764 (M.D. Fla. 1969).

105. HALE, *FIRST TREATISE* 338.

In the United States, Congress recognized the importance of such indirect as well as direct threats to "anchorage and navigation" in the Rivers and Harbors Act of 1899.¹⁰⁶ Furthermore, under the common law individuals found guilty of injuring or removing a natural barrier against the sea were guilty of an indictable offense.¹⁰⁷ In the Portsmouth Harbor cases, one of the Crown's two primary grounds for claiming that the wharf and associated improvements built on the harbor shore were nuisances was that if continued these improvements would

prejudice the aforesaid moorings, and would also be an obstruction to a quantity of water proportionable to their dimensions coming into and going out of the said harbour on each flux and reflux of the tide, and thereby prevent a great scouring and cleaning of the lower part of the channel of the said harbour . . .¹⁰⁸

The King's regulatory jurisdiction over the realm's waterways was even referred to as a "jurisdiction of conservancy," and the officers he appointed or that delegated towns appointed to supervise this work were known as "conservators."

Conservation is necessary not only as an adjunct of the right to free navigation, but also to the maintenance of fisheries, any right of bathing and recreation that may exist, commerce (tourism) and the public interest in seaweed and seashells. The theory was raised in the 1928 California case *Boone v. Kingsbury*.¹⁰⁹ The court held for the oil-drilling party in this early case primarily on the ground that the possible loss was counterbalanced by "the public benefit that will accrue to the commonwealth by the developing of the oil and other mineral wealth which lie beneath submerged lands . . ."¹¹⁰ J. Shenk dissented in part on the conservancy grounds proposed.¹¹¹

The "Public Interest." It is a rare court that would admit to using such a vague criterion as the "public interest" to determine foreshore disputes. This is a job best left to the legislature.¹¹² However, the public trust rights, as we have seen, are supposed to take precedence

106. 33 U.S.C. § 307 (1899).

107. *Ball v. Herbert*, 3 T.R. 253, 262 *et seq.* (1789); GOULD, *supra* note 1, at 174. See also note 34 *supra*.

108. *Att'y Gen. v. Parmeter*, 10 Price 378, 382-83 (1822). See also related cases cited in note 58 *supra*.

109. 206 Cal. 148, 273 P. 797 (1928).

110. 206 Cal. at 193, 273 P. at 817. This sort of balancing approach invites briefs detailing all the harm caused by pollution and waterfront decay.

111. 206 Cal. at 195, 197-98, 273 P. at 817-19.

112. 206 Cal. at 192, 273 P. at 812. "It was never doubted that an act of Parliament would operate to extinguish any public right of passage, whether by land or water. . . ." WOOLRYCH, *supra* note 37, at 272.

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over other claims to the use of tidal resources, and it is the courts' duty to enforce and administer this priority. Moreover, as we have also seen, the existence of each of these rights is based on cost-benefit calculations which the courts have made. Finally, as the public trust theory expands and becomes less rigid in its categorizations, it will be dealing more and more with determining the public interest, which need not be as fearful as it sounds if it is conceptualized as a package of rights that have been found to deserve special priority from Greek and Roman times.¹¹³

D. Who is "The Public?"

One important ambiguity in the public trust theory in the United States revolves around the question of "Trust for Whom?" Is the public local would-be users, state citizens, or all nationals? In England a peculiar local customary usage, even if not a general easement under the trust, was often protected,¹¹⁴ but the trust was impliedly national.¹¹⁵ The confusion came primarily in America. The original grants were made to each of the different colonies, which, even after Independence, retained title to the soil.¹¹⁶ In the words of the *Illinois Central R.R.* case, "It is a title held in trust for the people of the State . . ."¹¹⁷ The Constitution, however, seems to require that the trust be in favor of all United States citizens, at least regarding commerce and navigation¹¹⁸ and, under the Privileges and Immunities Clause,¹¹⁹ more generally.¹²⁰

113. Compare our list of proposed areas of protected public rights in the tidelands with Justinian's brief description quoted above in the text associated with note 8, *supra*. He specifically says that the interests in ports, navigation, free passage, commerce, fishing, and recreation ["retreat"] belong to the Roman citizen. Although he does not mention sand and seaweed, it is clear that they could be no one's private property, but rather belonged to all Romans in common. If Roman citizens had these rights, why shouldn't we?

114. *Howe v. Stawell, Alcock & Nap.* 348 (1833), *e.g.*, makes it clear that the taking of seaweed from the shore is "a liberty which may . . . [be] beneficial, and which may be established by local custom, but can be legally claimed for all the King's subjects, or any portion of them, [only] by virtue of such local custom, and not as being part of the common law." See also HALL, *supra* note 9, at 878.

115. Scotland, however, retained its own law.

116. ANGELL, *TIDE WATERS* 52.

117. 146 U.S. 387, 452 (1892).

118. U.S. Const., art. I, § 8; *Gilman v. Philadelphia*, 70 U.S. (3 Wall.) 713, 724 (1865).

119. U.S. Const., art. IV, § 2.

120. Or, as it is expressed by Lord Hall, "the *jus privatum* of the proprietor is subject to the *jus publicum* of the community." So the *jus privatum* of each State in its tide waters (or in other words the right of property therein conferred by the charters) is subject to the *jus publicum* of the United States, which is a free and uninterrupted passage for all the citizens of the United States.

ANGELL, *TIDE WATERS*, 51-52. See also the dissent of Justice Spence in *Mallon v. City of Long Beach*, 44 Cal. 2d 199, 215, 282 P.2d 481, 490 (1955):

Some things nevertheless appear certain. First that the State of California was itself a trustee rather than a trustor in relation to any trust imposed upon such tidelands, and that the beneficiaries of such trust were not alone the people of this state but

The identity of the trust beneficiary is, in other words, still clouded but at least to some degree national in scope. Regulation is concurrent, with the federal interest dominant. Although alienation of a state's property interest is unobjectionable (as long as it is considered *jus privatum*), it does seem that any such alienation, especially if linked to changes that will be in any way detrimental to existing public interest easements, should be interpreted narrowly by the courts in order to minimize possible infringement of federal rights. Alienation is, after all, both permanent and qualitatively somewhat different from regulation.

If a state holds the lands as *jus privatum* on the theory of having succeeded to the Crown's title, then it should logically be bound by both the long-standing limitations on grants by the Crown¹²¹ and the dominant requirement of not offending the public trust of the nation's citizens. If it holds them as representative of the sovereign (state) citizenry,¹²² then any action it takes must be justified both in terms of the state citizens' general welfare and also of the national population's not necessarily coincidental but certainly pre-eminent "easement" interests.¹²³

E. Public Trust Remedies

Violations of the public's rights in the foreshore are nuisances that can be challenged by the state and/or affected citizens and are subject to damages, injunction, and/or (especially) abatement.¹²⁴ Traditionally if a structure were to be erected in tidal navigable waters and were either a purpresture¹²⁵ or a nuisance against the public under traditional common law, it would be "liable to indictment, and to a private action in favor of individuals who sustain an injury distinct from that suffered by the other members of the public."¹²⁶ Whether a particular use of the foreshore is a nuisance is a question of fact for jury decision.¹²⁷

all the people of the United States. Thus it has been indicated that the federal government could enforce such trust [emphasis added].

121. See, e.g., pp. 767-68 *supra*.

122. See p. 772 *supra*.

123. The Roman common ownership was, as a matter of natural law, in all mankind.

124. Roman law provided both damage suits and injunctions as remedies for private infringement of public trust interests. W. HUNTER, ROMAN LAW 165 (1876).

125. The Crown had rights in tidal areas as a matter of prerogative, not held in trust for the people, but rather as the private property for the Crown. Purprestures are infringements on such rights.

126. GOULD, *supra* note 1, at 46.

127. HALE, DE PORTIBUS MARIS, 85; Regina v. Randall, 2 Carrington & Marchman 606, 607 (1842); The Queen v. Betts, 117 Eng. Rep., 1172, 1176 (1850). But see Att'y Gen. v. Richards, 2 Anstruther 603, 615-16.

III. Conclusion

The common law of the foreshore seems to be entering a major period of reformulation. The changes in the last half century in the underlying economic ratio of demand to the supply of such resources have been, if anything, more drastic than those that presaged the feudal switch away from Roman common ownership. The present chaotic state of foreshore doctrines reflects not only a long history of adjustments to the demand/supply ratio, but also the law's modern scramble to avoid injustice in particular cases. As more interests are threatened by the sharpened competition for tidal resources, new public easements are being created and/or rediscovered—and the more easements there are, the less any one of them can be absolute or the courts allowed an easy dependence on mechanistic formulae.

We are witnessing a sharp acceleration of a process begun around the time of Magna Charta, the reclamation of the public's interest in the foreshore. Perhaps the day when common law citizens will have as many rights in the foreshore as Roman citizens once did¹²⁸ is near at hand.

128. See p. 787 *supra*.